ERMINESKIN INDIAN BAND AND NATION V CANADA

Supreme Court of Canada (McLachlin CJ, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ)
13 February 2009
2009 SCC 9

Canada – constitutional law – fiduciary duty – right to equality – management of oil and gas royalties – whether the Crown was obligated as fiduciary to invest oil and gas royalties – whether the Crown breached its fiduciary obligations in the way in which it calculated and paid interest on royalties – whether the Crown was unjustly enriched by making use of the bands' royalties and setting interest rate paid to bands – whether ss 61 and 68 of the *Indian Act*, RSC 1985, c I-5 preclude the Crown form investing royalties contrary to s 15 of the *Canadian Charter of Rights and Freedoms*

Facts:

This case involved the appeals of two Indian bands (as defined by the *Indian Act*, RSC 1985, c I-5 ('*Indian Act*'), the Ermineskin Nation and the Samson Nation. Both bands were parties to *Treaty No 6* (1876) which entitled them to royalties derived from certain gas and oil reserves located in Alberta. Under instruments signed in 1946 surrendering these natural resource interests, the Crown was to administer royalties according to a statutory scheme contained in the *Indian Act*, the *Financial Administration Act*, RSC 1985, c F-11 ('*Financial Administration Act*') and the *Indian Oil and Gas Act*, RSC 1985, c I-7 ('*Indian Oil and Gas Act*'). These legislative schemes provided for Indian moneys classified as 'capital monies' to be deposited into the Consolidated Revenue Fund ('CRF') and interest paid according to an order in s 61(2) of the *Indian Act*. In 1969, an 'Indian moneys formula' was proposed tying the rate of interest to the market yield of government bonds having terms to maturity of 10 years or over. In 1981, a new order was enacted that provided that interest would be calculated on the quarterly average of the market yields of the Government of Canada bond issues.

The Samson statement of claim was filed in 1989 and the Ermineskin statement of claim in 1992. The appellants claimed the Crown as fiduciary had a duty to invest the Indian monies as a prudent investor; that is, into diversified portfolios instead of retaining them in the CRF.

There were several main issues the Supreme Court had to decide on appeal. First, it had to be determined whether the Crown had a fiduciary obligation to invest the oil and gas royalties. Second, if the Crown did not have an obligation to invest, the Court had to decide where the Crown breached its fiduciary obligations in relation to the way it calculated and paid interest on royalties. The third issue was whether the Crown breached its fiduciary obligations because it was in a conflict of interest as a fiduciary unjustly enriching itself by borrowing royalties. The final issue for the Court to decide was whether, if ss 61 and 68 of the *Indian Act* do preclude the Crown from investing the royalties, those provisions infringe the appellants' right to equality under s 15 of the *Canadian Charter of Rights and Freedoms.*

Held, per curiam, dismissing the appeal:

(i) in relation to the Crown's fiduciary obligations to the bands:

1. A fiduciary must act exclusively for the benefit of the beneficiary, putting his or her own interests completely aside, and work so that the fiduciary's own interests do not conflict with that of the beneficiary: [125]; *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 cited.

2. A fiduciary that acts in accordance with a statutory scheme cannot be said to be breaching its fiduciary obligations. The Crown is required by the combined operation of the *Indian Act* and the *Financial Administration Act* to borrow the bands' money held in the CRF. Therefore, a conflict of interest is an inevitable part of the statutory scheme and the Crown cannot be held accountable: [125]–[128].

3. The Crown, due to its many obligations and the many interests it represents, is not an ordinary fiduciary. Its obligation to act as a person of ordinary prudence is modified by legislation and its multiple obligations. Because the Crown pays the bands with funds from the public treasury financed by taxpayers, the Crown's position in relation to the setting of interest paid to the band involves a balancing of the Crown's fiduciary obligation to the band on the one hand, and the Crown's obligations to all Canadians as taxpayers on the other: [129]–[131]; *Wewaykum Indian Band v Canada* [2002] 4 SCR considered.

4. The Crown in its discretion as fiduciary had various options for setting the interest rate paid to the bands. These included: a flat rate, interest at the rate of short-term treasury bills, interest equivalent to the return on a diversified portfolio, interest at a rate tied to the yield on long-term government bonds but adjusted periodically, and interest at the yield on long-term government bonds guaranteed for the term of the bonds: [132].

5. The two alternatives for setting the interest rate that were in the Crown's fiduciary obligation to select were the laddered bond approach and the fluctuating rate; the latter was actually the rate selected by the Crown. In hindsight the laddered bond approach would have produced higher returns for the bands, but due to the fact that fiduciary obligations to the bands must be viewed prospectively, it cannot be said that the floating long-term rate was an imprudent choice by the Crown. The Crown in selecting the floating interest rate did not breach its fiduciary obligation to the bands: [147]–[149].

(ii) in relation to the transfer of funds to the bands:

6. Section s 64(1)(k) of the *Indian Act* allows the transfer of capital monies from the Crown to either the bands themselves or to an independent trust, either of which can then proceed to invest the money. The Crown, as fiduciary, has to ensure that any transfer of money is within the best interest of the relevant band. In deciding whether it is in the best interest of a band, the Crown should have regard to past dealings with the band: [150]–[152].

7. In regard to the Samson Band, a transfer prior to 2005 would have been imprudent, even in light of the Crown's support for the Band's proposal for the development of several trust funds. This is because the Crown was not assured that the transfer would be in the best interest of the Band, as in previous dealings the Crown had difficulty in uncovering information as to the disposition of CAD$35 million of transferred funds, and there was a failure of the Samson Band to provide adequate financial plans and assurances of band support: [169].

8. In regards to the Ermineskin Band, the Crown was restricted by legislation in the *Indian Act* from investing Ermineskin's royalties and needed the Band to support legislation that would give the Crown legal authority for the transfer. The Band was unwilling to release the Crown from any future responsibility in relation to management of the transferred funds under the legislative amendment. However, the Crown would only agree to a transfer of the funds if its fiduciary obligations would not then come to an end. It would not be prudent for the Crown to transfer the funds without an assent from the Band that they no longer were responsible for the funds: [171]–[181].

(iii) in relation to unjust enrichment of the Crown:

9. The test for unjust enrichment has three elements: an enrichment of the defendant, a corresponding deprivation of the appellant, and an absence of a juristic reason for the enrichment: [183]; *Garland v Consumers Gas Co* [2004] 1 SCR 629 applied.

10. In determining whether the Crown was enriched, a comparison must be made with what would have been the case if the Crown had not had access to the royalties in the CRF. The Crown was not enriched because, in a comparison with what would have been the case if the Crown had not access to the royalties, the Crown would have obtained replacement funds at a lower cost than the interest it actually provided on the royalties: [184].

(iv) in relation to the appellants' right to equality under s 15 of the *Canadian Charter of Rights and Freedoms*:

11. In order to prove a breach of the right to equality under s 15 of the *Charter* a complainant must not only show that he or she is not receiving equal treatment before the law or that the law has a differential impact on him or her in the protection or benefit accorded by the law, but in addition, must show that the legislative impact of the law

is discriminatory: [188]; *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 considered.

12. Sections 61 and 68 of the *Indian Act* create a distinction between Indians and non-Indians. However, it is unclear whether the money management provisions that preclude investment of Indian moneys by the Crown create a disadvantage, as it is misleading to gauge disadvantage on the basis of returns. Even if the preclusion of investment is a disadvantage, the provisions of the *Indian Act* do not discriminate in the sense that they perpetuate prejudice or stereotyping contrary to s 15 of the *Charter*. In determining whether discrimination exists one has to look at the impugned legislation and the broader social, political and legal context. Sections 61 and 68 of the *Indian Act* do not discriminate in that they prohibit investment of Indian moneys by the bands themselves or by trustees on their behalf. Under the legislation, in order to effect a transfer, the Bands simply need to satisfy the Crown that the transfer of the funds would be in their best interest and that the Crown would be released from further responsibility with respect to the royalties: [193], [200]–[202]; *R v Turpin* [1989] 1 SCR 1296.